IN THE

SUPREME COURT OF THE UNITED STATES

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GULF, COLORADO & SANTA FE RAILWAY COMPANY,
Petitioner,

vs.

MRS. OLENA MOSER, ADMINISTRATRIX, *Respondent.*

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PETITION FOR CERTIORARI

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The Gulf, Colorado & Santa Fe Railway Company, chartered and domiciled in Texas, respectfully petitions this Court to grant it a writ of certiorari to the Court of Civil Appeals of Texas, Third Supreme Judicial District, at Austin, directing said Court to certify to this Court for review and determination the judgment of said Court affirming judgment in favor of respondent, Mrs. Olena Moser, Administratrix, in District Court Bell County, Texas, in suit of said Administratrix against Petitioner, a copy of the record in said cause being presented herewith.

Petitioner shows that important Federal questions, dependent upon the correct construction and proper application of the provisions of the Act of Congress known as the Federal Employes Liability Act, Sections 8657-8665, inc., U. S. Compiled Statutes, 1918, are involved particularly concerning the measure of

damages recoverable and the rules by which amount of recovery is to be determined and as to the amount that may be awarded; and that by the erroneous ruling of the State Courts, particularly of said Court of Civil Appeals in the respects stated, Petitioner has been denied titles, rights, privileges and immunities set up and claimed by and under said Act; and said State Courts in that behalf have also decided Federal questions of substance not theretofore determined by this Court or has decided them in a way probably not in accord with applicable decisions of this Court.

SHORT STATEMENT OF THE CASE AND MATTER INVOLVED

Suit for death April, 1923, of husband of Respondent and father of an only child seventeen months old, resulting from floor of a steel coal car giving way as he passed over same in the discharge of his duties as a brakeman in employ of Petitioner (Rec. pp. 1-6), while car was enroute in Texas moving with a load of pipe from Pittsburgh, Pa. (Rec. pp. 89-90; 98-114), and so moving in interstate commerce as is alleged by plaintiff (Rec. p. 4), it being admitted by both parties in open court that both defendant and deceased were engaged in interstate commerce at the time of his death (Rec. pp. 81-82), death being charged to negligence of defendant, which was found by jury.

Moser was 28 years of age (Rec. p. 79), and if engaged in a non-hazardous occupation would have had an expectancy under American Experience Tables

of 36.73 years (Rec. p. 92), but in hazardous occupation of brakeman, insurance companies reduced the expectancy to 31.7 years (Rec. p. 122).

From July, 1921, to his death Moser averaged $148.00 per month under wage scale then prevailing. During the high wage scale result of great war, stated by witnesses as being "the highest wages ever paid railroad men in this country" (Rec. p. 115), he made more than this a little more than a year, but prior to that time his monthly earnings were much below the $148.00 (Rec. p. 150).

C. C. Grazier, witness for plaintiff on basis of records kept by defendant, testified as to probabilities of promotion for Moser in substance that it would be about seven years before he would have been eligible for promotion to conductor; if he passed examination and was promoted he would still only be used as extra conductor and wages would not be much increased until he got a regular run, which would not occur for from fifteen to seventeen years from time he was set up as conductor; that is, it would be in the neighborhood of twenty-three years from time of death before he would get a regular run; that after promotion until he got a regular run he would generally run as brakeman and be used as conductor only in emergency, but amount of work done as conductor would increase as years passed and by the time he had been promoted ten years his reasonable earnings would be between $2100.00 and $2200.00, and the maximum he could expect to reach at time he got a regular run would be $2200.00 or $2250.00 (Rec. pp. 82-86); that

if he got a regular run what he would make would vary with amount he laid off; if a steady worker it would run from $2500.00 to $2700.00 per year; that amounts stated were maximum reasonably probable for a man that works reasonably steady (Rec. pp. 86-87); that there was no probability of his ever getting to be a passenger conductor; too many ahead of him (Rec. pp. 86; 87-88).

These figures were not disputed and upon them defendant submitted to a qualified actuary a table of probable earnings of Moser made up on basis:

For seven years at $1800.00 per year—approximately what he had been making for 22 months prior to his death;

For sixteen years (average between 15 and 17), $2050.00 per year, a little more than an average between what he would start with and what he would have obtained by end of period, $2250.00;

For the remaining fourteen years of his full expectancy of 37 years (an average between $2500.00 and $2700.00) at $2600.00.

On basis these figures, to-wit, a gross income of:

$1800.00 per year for seven years,
$2050.00 per year for sixteen years,
$2600.00 per year for fourteen years

and on assumption that Moser would have spent at least one-third his earnings on himself for upkeep and expenses, the actuary testified for defendant that two-

hirds of such yearly income reduced to present value ould be, at 6%, $21,845; at 7%, $19,439; at 8%, 17,446. (Rec. p. 125.)

On cross examination plaintiff showed by witness hat present values same amount for same number of ears--total income, not two-thirds—at 4% would be 42,416.00. (Rec. pp. 125-126.)

By an insurance agent plaintiff showed that an an- uity of $1800.00 per year for one 28 years of age t 4% would cost $33,048; and of $2000.00, $36,720; f $3000, $55,080. (Rec. pp. 92-93.)

Verdict of jury for $34,000, apportioned $18,000 to Irs. Moser and $16,000 to child (Rec. pp. 27-28), and udgment accordingly (Rec. pp. 28-29) affirmed by ourt of Civil Appeals and motion for rehearing over- uled (Rec. p. 132), and the application for writ of rror to State Supreme Court dismissed for want of urisdiction, and motion for rehearing there overruled Rec. p. 142).

The only other testimony bearing on the question f damages is:

That of Mrs. Moser that she was married in 1918; hat when Mr. Moser was off duty he was in habit of taying at home; loved his baby; loved to take her round; loved to stay at home and help her; had no ad habits; had just had a public school education; pent all his earnings on his family and did not send is parents anything; his physical health and condi- ion was good at time of his death. (Rec. pp. 78-79.)

And another lady testified that she knew Moser well; "knew him to be a good man, devoted father and husband, and a man who loved his family." Rec. p. 91.)

Case was submitted to jury on special issues, but court charged jury regardless of other questions they would assess damages and "arrive at the amount thereof by assessing the same at such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child for such actual pecuniary loss as you may believe from the evidence that they had a reasonable expectation of receiving from said John H. Moser, if any, from and after the death of the said John H. Moser, if he had not died on the date alleged. By pecuniary loss is meant such loss as may be compensated for in money. In answering special issue No. 7, you will take into consideration the contribution of money and other pecuniary benefits, if any, which the evidence may show that said surviving wife and child would have received from him after the time of his death, if he had continued to live; and in estimating the pecuniary loss suffered by the minor child of the deceased by reason of his death, you may take into consideration such advice and training, if any, as the evidence may show that the child would have received from deceased after the time of his death, if he had continued to live," • • • but as to the minor they would confine themselves to such contributions as Moser might have made "to the period of her minority." (Rec. p. 21.)

Court then instructed jury not to consider society nd companionship or grief or distress; "and in assessing the damages, if any, you will confine yourelves solely to the determination of the pecuniary nd monetary interest, if any, that plaintiff and her hild, had in the continued life of the deceased." Rec. pp. 21-22.)

Special issue No. 7 as submitted by the Court was s follows:

> "What amount of money, if paid now, will fairly and reasonably compensate the surviving widow and child of the deceased, John H. Moser, for the actual pecuniary loss which they respectively suffered by reason of his death, if any? This question you will answer by stating the aggregate amount of such pecuniary loss or damage, and you will answer in the space below the amount you find from the evidence." (Rec. p. 22.)

Defendant objected to the court's charge on ground at Court instead of telling jury that they will arrive such sum as if paid in cash at this time will be fficient to fairly compensate surviving wife and ild, etc., should tell jury that they will assess damge at present value of contributions in money (or her thing of value if there be any other thing of lue to be considered under the testimony, which dendant denies) that they may find from evidence deased would probably have made if he had continued live, and explain to jury how such present value such contributions may be determined under evince, confining them to that portion of evidence

which affords basis for determination of such present value (Rec. p. 24), and that charge was generally too broad, not definite and specific enough; that jury should have been more in detail instructed as to matters they should consider in line with defendant's requested charges (Rec. pp. 25-26), and because special issue does not give jury any rule or formula by which they may determine amount of money that if paid now would fairly and reasonably compensate surviving widow and child for actual pecuniary loss, etc. (Rec. p. 26.)

And the defendant asked among others a special charge (its No. 8) as follows:

> "In considering of your verdict on the question of damages, and under the special issues submitted to you in that connection, and thereunder in determining 'such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child,' for their pecuniary loss, you are instructed that in determining the present value of such contributions as plaintiff would probably have received from the continued life of the deceased, you will make your calculations on the basis of the amount of your award bearing interest at the highest net rate of interest that the testimony shows can be had on money safely invested, and secured as shown by the testimony in this case," which was refused. (Rec. pp. 9-10.)

Defendant further requested instructions to the jury which the Court refused, submitting in substance:

That in determining of the amount of damages they

would consider that it was the wife's duty to render such services to the husband as the relationship of wife reasonably imposed; and they would determine from evidence nature and character of such services as she would have rendered her husband and the draft that would have been made on her time, energy and strength to render such services, etc., and reasonable cash value of such time, energy and strength by reason of the death that was saved to her and made available to her to be used otherwise and credit on or deduct same from the present cash value of pecuniary contributions that Moser might have made to his wife, etc. (Rec. pp. 10-11); and a like instruction as to the services that child owed her father and might be relieved of by his death, etc. (Rec. pp. 11-12.)

That in determining damages sustained by Mrs. Moser they would take into consideration the reasonable probability, if such they found, of Mrs. Moser marrying again. (Rec. pp. 7-8.)

Defendant objected to Court's charge in so far as it submits elements of nurture, advice and training on grounds that there was no evidence that she would have received from him any nurture, advice or training of any character whatsoever; and that there was no evidence that any such nurture, advice and training had any pecuniary value, and if so what it was, or that it was capable of being compensated for in money (Rec. p. 25); and submitted a special charge withdrawing such elements from jury (Rec. p. 8); and another in the alternative that they would only consider such nurture, advice and training as was of

a character that could be measured by money value; that is, such as could be supplied by the services of another for compensation. (Rec. pp. 12-13.)

Defendant also asked special instructions to jury in substance as follows:

That they would:

Take into consideration possible decrease in wages or earnings of deceased they may believe will reasonably result in future, if any, from return to normal from abnormal and unusual conditions, result of great war. (Rec. pp. 13-14.)

Take into consideration such diminution of his income as might reasonably result from loss of time from sickness or his being out of employment, etc. Rec. pp. 14-15.)

Consider the likelihood of earnings of deceased becoming less during latter years of his life. (Rec. p. 15.)

Consider hazardous nature of his employment and make such reduction of probable contributions as they believed ought to be made account thereof. (Rec. p. 16.)

Defendant offered the testimony of qualified experts from Dallas, Fort Worth, Houston, and from Temple in Bell County, where the case was tried, the witnesses testifying that, as to their respective localities, money could be placed on real estate security at approximately a 50% valuation of property at 8% net to lender; that such was prevailing rate, with no diffi-

culty in placing loans—and that the skill and experience to make loans safely were furnished by the broker and he was paid a commission by the borrower. One witness testified that he had placed approximately Two Million Dollars in fifteen years with one foreclosure and no loss, and another that his concern had placed in ten years an estimated amount of $10,000,000.00 at the 8% rate. (Rec. pp. 79-81; 96-97; 117-122.)

There was no contradiction of this testimony but on cross examination of some of the witnesses it was developed by plaintiff that some large investments had been made in Government Bonds in the state and in other parts of the country on gilt edge securities at 3½% or 4% and that on choice business property money could be had at 6%. (Rec. pp. 80-81; 118.)

On hearing motion for new trial testimony of nine jurors was taken, (Rec. p. 61 to p. 77) and while the phraseology of witnesses is different they are a practical unit in saying that no attempt was made to reduce the contributions through the years to present values; that they gave no consideration whatever to the earning capacity of the sum of money presently to be awarded and did not understand from the Court's charge that any such process of calculation was required of them; and it appears absolutely that they followed the rule of Supreme Court of Kentucky in C. & O. v. Kelly, the rule condemned by this Court, taking as a basis for their verdict the sum of probable contributions through the years without attempt to reduce to present values.

They took different bases for calculation but all followed same process. One took earnings at $1800 per year and half of that as probable contributions, multiplying the $900 by 36, making $32,000.00 and "lopped it off" to $30,000.00 (Rec. p. 61); another $1000.00 per year for contributions, or $36,000.00 and knocked it down to $35,000.00 (Rec. p. 62); another two-thirds of $1800.00 or $1200.00 per year, multiplied by 36, making $43,200, lumped it off to $40,000.00 (Rec. p. 67), etc. One testified he understood charge required them to issue this lady a certain amount of money which would be sufficient to support her and her child (Rec. p. 62); another that he was at first for $40,000, figuring it would take that much to support this woman and child and educate this child, did not figure any rate of interest $40,000.00 could be made to make (Rec. pp. 64-65); another, the foreman, used as a basis for his verdict $1200.00 per year as contributions, was at first for $40,000.00, "a sum that could be drawn out without regard to anything being put out at interest at all—which would make up what he would have contributed to his family if he had continued to live," but did not go through any process of mathematical calculation and don't know that any of the jury did, according to rules of life expectancy or annuities, etc. (Rec. pp. 67-69); another: "the charge said to give her a sufficient amount of damage to educate the child and support Mrs. Moser and that is what I undertook to do" (Rec. p. 70); another: "I figured it was like this: that it was Mrs. Moser's business after the money was paid to her to do as she pleased with it

and I thought that if she wanted to put it out at interest it was her business. The charge said to give her in a lump what was to keep her up and that child, that is the way I understood it. I made no allowance as to what that money could be made to earn." (Rec. p. 76.)

There is not the slightest suggestion anywhere in the testimony of the jurors that they considered anything else but the pecuniary contributions and not a single reference to the elements of advice, nurture, etc., to the minor child. (Rec. pp. 61-77.)

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

(1) The brief and indefinite expressions of the Court's charge to assess the damages "at such sum of money as paid in cash at this time would be sufficient to fairly compensate the surviving wife and child" for the actual pecuniary loss, and they should find what amount of money "if paid in cash now would fairly and reasonably compensate the surviving widow, etc.," are not sufficient to convey to the minds of a jury the rules laid down by this Court in *C. & O. v. Kelly* and *C. & O. v. Gainey*, 241 U. S. 485 and 494; that the charge as given is open to the defendant's objections that it was not definite and specific enough and that the jury should have been told that they would assess plaintiff's damage "*at the present value* of the contributions in money"; and charge should explain to the jury how such present value of such contributions may be determined from

the evidence; and it did not give the jury any rule or formula by which they might determine the amount of money as if paid now would fairly and reasonably compensate, etc.

(2) Defendant was entitled to have its special charge No. 8 given, specially in view of the vague and indefinite expressions used by the Court in its charge on the question of reduction to present values. It is the definite holding of this Court in the Kelly case that "in all cases where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award"; and it was undisputed that money could be made to earn safely in Texas net 8%; but conceding that the right of the Court to fix that as a rate might be open to question, it is certainly the law that it was the jury's obligation to reduce the contributions at the highest rate of interest they found the testimony showed *could be had on money safely invested.* The special charge as asked leaves it to the jury to determine what such rate was but charges them with the obligation to determine *such a rate* and *use it* in reducing to present value.

(3) The record shows that the amount of the award will yield the plaintiffs yearly throughout their entire lives at reasonable rates of interest even more than the entire annual earnings of the deceased and leave the principal intact at the deaths of the beneficiaries; and under any rates of interest entitled to be considered, bring in every year during their lives more than any probable contributions of de-

ceased and still leave the principal intact at their death. And it is absolutely clear that the rule of C. & O. v. Kelly has not been applied in this case and that the award is clearly in violation thereof and grossly in excess of what would be a proper award under the rule.

(4) The testimony of the jury shows unqualifiedly that the defendant's exceptions to the charge were well taken; that the jury would not understand therefrom that reduction to present value was required; and that as a matter of fact no attempt was made to reduce to present values; and that the award was made under the rule laid down by the Supreme Court of Kentucky and not under the rule of this Court.

(5) By the death of Moser his wife and child were relieved of service to him that the relationship cast upon them and defendant was entitled to have the jury instructed that such savings of service should be considered by them in reduction of any award they might otherwise make.

(6) That a woman as young as Mrs. Moser would marry again was altogether reasonable and the just and sound rule is that such probability should be considered by the jury in determining the damages.

(7) There was nothing in the evidence to show that Moser had by temperament or training any qualifications that would render any nurture, advice or training by him a matter of pecuniary value. In any event, the only elements of that character that could be recovered for were such as had pecuniary value; that is, such as could be supplied by another for

compensation and the jury should have been instructed elements of such character only could be considered.

(8) Defendant was entitled to have its special instructions given directing the jury to consider the probability, if any, of a reduction of wages by reason of return to normal conditions after the abnormal conditions of the war; the probable diminution of income reasonably to be expected from advancing age and from sickness and being out of employment, etc.; and the hazardous nature of the employment in which deceased was engaged.

Wherefore Petitioner prays for a writ of certiorari and upon hearing this cause be reversed with such orders as this Court deems proper under the law.

Respectfully submitted,

ALEX. BRITTON,
J. W. TERRY,
CHAS. K. LEE.

Attorneys for Petitioner.

In the

SUPREME COURT OF THE UNITED STATES

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Gulf, Colorado & Santa Fe Railway Company,
Petitioner,

vs.

Mrs. Olena Moser, Administratrix, *Respondent.*

—o—

BRIEF IN BEHALF OF PETITIONER IN SUPPORT OF FOREGOING APPLICATION FOR WRIT OF CERTIORARI

—o—

The decision of the Court of Appeals of Texas in this case will be found in 277 S. W. 722, printed record pages 127-131; and the judgment of the Supreme Court dismissing the application for want of jurisdiction is shown in foot note 277 S. W. 722 and in printed record page 142.

Action being expressly and solely to enforce a liability under the Federal statute, the questions presented are Federal.

St. L. I. M. & S. Ry. Co. v. McWhirter, 229 U. S. 256, 57 L. Ed. 1179.

St. L. I. M. & S. v. Taylor, 210 U. S. 281, 52 L. Ed. 1061.

Seaboard Air Line v. Duvall, 225 U. S. 477, 56 L. Ed. 1171.

Seaboard Air Line v. Horton, 233 U. S. 492, 58 L. Ed. 1062.

"The question of the proper measure of damages is inseparably connected with the right of action, and in cases arising under the Federal Employes Liability Act it must be settled according to the principles of law as administered in the Federal Court."

C. & O. v. Kelly, 241 U. S. 485, 60 L. Ed. 1117.
C. & O. v. Gainey, 241 U. S. 494, 60 L. Ed. 1125.
North Carolina v. Zachary, 232 U. S. 248, 58 L. Ed. 591.

Where the record makes it evident that the case was tried contrary to decision of this Court in C. & O. v. Kelly, i. e., by taking the sum of the annual contributions through the period of expectancy without any attempt to reduce to present values, the judgment complained of must be reversed. *C. & O. v. Gainey*, 241 U. S. 494, 60 L. Ed. 1125.

(1)

The record makes it clear that the verdict in this case cannot be justified under the rules of the Kelly and Gainey cases and that it was arrived at by the application of the rules laid down by the Kentucky Court, condemned by this Court.

The data and table submitted to the actuary Anderson as a basis for figuring present values (App. 4)

is as favorable to the plaintiff as could possibly have been asked. That it was so has never been challenged.

On the basis of this table, that is multiplying the number of years by the respective annual wage for the three periods, the total earnings would have been $81,800.00.

Plaintiff's counsel proved by the witness Anderson that the present cash value of these same earnings figured at the low rate of four per cent would be $42,416.00, that is to say that *the present value of the same earnings through a period of thirty-seven years was just a little over fifty per cent of the total of those earnings.*

The testimony of the jury shows that they followed the rule approved by the Kentucky court.

While there was a difference among the jury as to the amount of probable contribution per year, they all multiplied the annual contribution by the expectancy and set their verdict at approximately the result, knocking off small amounts to make round figures.

Moreover they figured generally that Moser would have contributed approximately one-half of his earnings to his wife and child.

Figured on this basis—i. e., that Moser would have contributed half his earnings for full 37 years to his wife and child—under Anderson's testimony as developed by plaintiff, that is at low rate of 4%—mani-

festly too low for Texas—the verdict would have been for $21,208 as against the $34,000 as rendered.

The jury considered nothing but Moser's earnings. No other element of damage is mentioned by them.

When it is considered that in making up the basic figures no deduction is made for probable sickness or vacations or on account of probable lessening activity with advancing years; or because the real expectancy in Moser's calling was approximately thirty-one years instead of thirty-seven; or that the amount to be awarded the minor should be calculated to her majority or approximately for nineteen years instead of thirty-seven, it is manifest that even a $21,208.00 figure is too much.

The amount of this verdict at eight per cent will yield $2720.00 per year; at seven, $2380.00; at six, $2040.00; at five, $1700.00; and at the rate that Government Bonds bear—four and one-half per cent, $1530.00 per year; at four per cent, $1360.00.

The total earnings for 37 years, $81,800, would average $2210 per year, and on the basis that the jury calculated (the contributions equal to approximately one-half of earnings) the average yearly contribution would have been $1105.

Then the verdict would yield at 4%, $255 per year more than this annual contribution; at 5%, $595 per year more; at 6%, nearly twice as much, etc., and in each instance the principal of the verdict will remain intact and unimpaired at the death of the beneficiaries.

Not only this, but as to the $16,000.00 awarded the minor, she gets her proportionate part of these incomes, nearly one-half, up to the year she becomes twenty-one years of age, and thereafter for the balance of her life and still will have the principal intact for her children at her death.

Defendant made its figures in the trial court on the extremely liberal basis to plaintiff of their receiving two-thirds of the annual earnings.

Two-thirds of the average annual earnings, $2210, as above figured, would be $1474.00 per year.

On this two-thirds basis the annual income on the verdict at 8% will be nearly twice the contributions; at 7% about $900.00 more; at 6% nearly $600.00 more; at 5%, $226.00 more, and at Government Bond rates, 4½%, $56.00 more per year, with the capital always unimpaired.

From thoroughly credible sources and without any contradiction whatsoever, the defendant showed that money could be safely loaned in Bell County and in other sections of the State—with ample demand—at eight per cent, without risk and without cost to the lender, the broker furnishing for a commission paid by the borrower, the requisite skill and judgment. This testimony being undisputed, we insisted in the court below that we were entitled to have the eight per cent rate used.

But certainly in the light of the record consideration of a rate lower than six per cent was unwarranted.

Under the testimony of Anderson, which is in no way questioned, two-thirds of the annual earnings figured at eight per cent would have a present value of $17,446.00; at seven per cent, $19,439.00; and at six per cent, $21,845.00.

And taking Anderson's figures developed by plaintiff, the same earnings, reduced to present value at four per cent have a present value of $42,416.00, and assuming that plaintiffs would have received two-thirds of the earnings, the present value of what they would receive being one-third less, would be $28,281.00, even figured on the whole thirty-seven year period.

And taking the cost of annuities as proved by plaintiff, or $18.36 for each dollar (testimony of Bassett, Rec. p. 93) and multiply this by $1474.00, two-thirds of Moser's average annual income under the table for the full thirty-seven years, gives a maximum verdict of $27,062.64 as against the $34,000.00 rendered.

So it is apparent from these figures that on the lowest bases suggested, the judgment is six to seven thousand dollars excessive, even though figured at an expectancy of thirty-seven years when thirty-one was the proper one, and without cutting it down to the period of minority or making any allowance for advancing age, sickness, etc.

At the rate of six per cent it is approximately $12,000, i. e., more than a reduction to present values

will warrant, and at seven, about $15,000; and at eight, about $16,500.

Aside, therefore, from the testimony of the jury that no such rule was considered, the record makes it clear that the verdict was not reached by application of the rule of reduction to present value and that the verdict while guaranteeing plaintiffs every dollar of contribution that could be reasonably expected and more, will not, as required by the rule, *absorb itself*, but will *perpetuate itself* and will continue a fund that will yield the same annual rate for all time to come, being therefore, clearly in the condemnation of the Kelly case in that it affords more than compensation, being arrived at by aggregating the benefits without taking account the earning power of the money presently to be awarded.

Added to this is the clear and uncontradicted testimony of the jurors—nine of them—*that no attempt was made to reduce to present values*, and that the verdict reflects *only the sum of the contributions* reasonably to be anticipated.

In the cases of *L. & N. v. Trammel* (Ala.), 9 So. 870; *McAdory v. L. & N.* (Ala.), 10 So. 507; *Central Railroad v. Rouse* (Ga.), 3 S. E. 307; *A. & W. v. Newton* (Ga.), 11 S. E. 776, all cited by this Court in the Kelly case, and in the cases of *Chaffin v. N. & W.*, 93 S. E. 822; *Jones v. Kansas City Southern*, 78 So. 568; *Simmons v. L. R. & N. Co.*, 96 So. 12, citing and following the Kelly case, verdicts are analyzed under the records as we have under-

taken to analyze the verdict in this case, and the verdicts condemned because of being manifestly more than present values, as we think clearly this verdict should be condemned.

In the very recent case of *Sipes v. Michigan Central* (Supreme Court of Michigan, decided June 15, 1925), 231 Mich. 404, 204 N. W. 84, the Supreme Court of Michigan says:

> "The amount awarded would yield an income, if placed at interest at 5 per cent, of $758.33 per annum, come within $3 of decedent's average yearly earnings, and at the end of 39 years the sum awarded would still be intact. In Chesapeake & Ohio R. Co. v. Gainey, 241 U. S. 495, 36 Sup. Ct. 633, 60 L. Ed. 1124, the widow had verdict for $16,000, and it was insisted that the award if placed at interest, would yield an annual income greater than the amount the widow would have received, and yet leave her the principal to dispose of at her death. It was held that such a result is not permissible."

(2)

The charge of the Court was not full enough to inform the jury the rule of the Kelly and Gainey cases —that the contributions to be expected through the years must be reduced to a present value by taking into consideration the earning power of the sum presently to be awarded; and defendant's exceptions should have been sustained and the charge made more full; and specially its charge No. 8 should have been given.

The Kentucky court in the Kelly case declined to apply the rule of reduction to present values because it regarded a jury as incapable of determining a verdict under such a rule.

This Court points out the fallacy of this position and undertakes to make clear to trial courts the rules by which the determination of a verdict in cases of this kind must be had.

And pertinent to the question in hand the following principles are laid down:

> "It is self-evident that a given sum of money in hand is worth more than the like sum of money payable in the future."

That a verdict will afford more than compensation if it be made up by aggregating the benefits without taking into consideration the earning power of the money that is presently to be awarded.

That a person seeking damages must use reasonable care to lessen the damage.

That at this day the putting out of money at interest is so common a matter that ordinarily it cannot be excluded from consideration in determining the present equivalent of future payments, etc.

That local conditions are not to be disregarded.

That the principle of limiting the recovery to compensation requires that adequate allowance be made according to the circumstances, for the earning power of money; in short, that when future payments or other pecuniary benefits are to be anticipated, the

verdict should be made upon the basis of their present value only.

And in all cases where it is reasonable to suppose that interest may be safely earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award.

To convey all of these principles to the mind of a jury unlearned in the law and unfamiliar with such matters, and thought by the Kentucky Court not capable of considering them at all, it is held by the Texas Court of Appeals in this case that it is sufficient to use in the charge to the jury the brief talisman "at this time"; that these three words "clearly encompassed (meaning, we take it, were in themselves sufficient to convey to the mind of the jury the obligations to find, etc.), present value of future expectations."

The full language of the charge quoted by the Court as being sufficient, when aided by the three words quoted, is as follows: "At such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child for such actual pecuniary loss," etc.

To a trained lawyer fresh from a reading of the Kelly and Gainey cases, the expression "at this time" *might* have been understood as an injunction to reduce to present values.

But that they would convey the same idea to an unlearned jury who knew nothing of the Kelly or Gainey cases, is a very different matter.

The emphatic, controlling words of the charge with the average jury naturally and practically always sympathetic with the injured party, specially a widow and children, are, we think, "such sum of money as * * * would be *sufficient* to *fairly compensate* the surviving wife and child," etc.

And the testimony of the jurors shows clearly that this was the controlling language with them.

Defendant made timely objection to the charge on the ground that the language used was not sufficient and that the charge "should tell the jury that they will assess the plaintiff's damage at the present value of the contributions in money * * *."

"To fix the damages at the present cash value of the contributions in money" is the expression of the charge asked in the Kelly case, and is certainly a very much clearer and more definite instruction than simply to refer to a payment "at this time."

But we asked further that the Court should explain to the jury how such present value may be determined under the evidence.

The defendant had laid before the jury in line with the suggestion of this Court in the Kelly case, accurate and well worked out data by which the present value could be determined.

This testimony was a thing of value to the defendant under a full charge by which the jury would have been advised as to their obligation with reference thereto.

But the practical ignoring of this line of proof and the absence of any instruction directly bearing upon it was calculated to entirely nullify its effect before the jury—as the testimony of the jury shows that it did; and the presence of the testimony therefore, did not aid the charge.

The charge is further objected to on the ground that it did not give the jury a rule or formula by which it might determine the amount of money if paid now that would fairly and reasonably compensate, etc.

Under Texas practice where timely objection is made to a charge and the defect in it pointed out, it is not necessary for the saving of the error that special instructions should also be asked. *G. C. & S. F. Ry. Co. v. Conley*, 113 Texas 473; *G. C. & S. F. Ry. Co. v. Locker*, 273 S. W. 831.

But in addition to the objections made to the Court's charge defendant asked a charge requiring the reduction to present values on the basis of 8%.

This Court said in the Kelly case that in *all cases where it is reasonable to suppose that interest may be safely earned upon the amount* that is awarded, the ascertained future benefits ought to be discounted in the making up of the award.

The undisputed testimony in this case showed that 8% could be safely earned in Bell County and in Texas upon the amount; and there was no contradiction of this testimony, and under the well settled rule that where testimony is undisputed the facts are to be taken as so shown (*Grand Fraternity v. Melton*,

102 Texas at page 402; *Hines v. Pennington*, 240 S. W. at page 704; *Hall v. Ripple*, 145 S. W. at page 311) defendant felt that it was entitled to have the reduction figured on an 8% basis.

But certainly defendant's special charge No. 8 (App. 8) was not open to the objections that might be lodged against the instruction as to 8%.

It directed the jury "to make their calculations on the basis of their award bearing interest at the highest net rate of interest that the testimony shows can be had on the money safely invested and secured, as shown by the testimony in this case."

This charge is directly based on the last quotation made from the opinion in the Kelly case.

It did not undertake to say what the rate should be. It did, however, require the jury to find a *safe rate* and to make a reduction *on the basis of that rate*.

And a safe rate being found by them there was certainly no discretion in the jury to figure out a lower rate, 1, 2, 3, 4, etc., per cent as they willed.

As applied to a court discretion means "sound discretion guided by law and must be governed by rule, not by humor. It must not be arbitrary, vague and fanciful" (Lord Mansfield, 4 Burrows 2539); it is to be exercised in determining the course prescribed by law; and, when it is discerned it is the duty of the court to follow it (*Osborne v. Bank*, 9 Wheat 737), and certainly an unlearned jury has not a wider discretion.

In *Seaboard Air Line v. Tilghman*, 237 U. S. 499, 59 L. Ed. 1069, where the question was as to a proper charge on the question of reduction of damages because of contributory negligence, this Court says:

> "No reference was made to the rule of proportion specified in the statute, or to the occasion for contrasting the negligence of the employee with the total causal negligence as a means of ascertaining what proportion of the full damages should be excluded from the recovery. On the contrary, the matter of diminishing the damages was committed to the jury without naming any standard to which their action should conform other than their own conception of what was reasonable."

The charge of the Court in this case is subject to the same condemnation.

(3)

The Court should have charged the jury that in determining their award they should consider the value of the services of the wife to the husband and of the child to the parent of which they were respectively relieved by the death.

It is well settled that in a suit by the husband for the death of the wife that the measure of damages would be the pecuniary value of the wife's services *less the cost of properly and suitably maintaining her. G. C. & S. F. v. Southwick*, 30 S. W. 593; *Gorton v. Harmon*, 152 Michigan 472, 116 N. W. 443; Corpus Juris, Vol. 17, title "Death", Section 233.

The same rule also applies in a suit for the death of a son or daughter. *Griffey v. Pac. Elec. Co.*, 209 Pac. 50; *Snyder v. Lake Shore & Michigan Central R. R.*, 91 N. W. 646; *McDonald v. Iron & Steel Co.*, 103 N. W. 829.

The reason the cost of maintenance should be deducted is of course because more than compensation would be awarded if the full value of the services of the wife or child were allowed without such deduction.

As a rule the wife does not maintain the husband, or the child the parent.

But the wife's services to the husband and the child's services to the parent are of value and they may be recovered for and very large amounts have been allowed on account thereof.

The rendering of such services requires time, energy and strength.

By the death of the husband the wife is relieved of those services.

That in some instances the value of the wife's services to the husband may be greater than the prospective pecuniary benefits, from his continued life, cannot change the rule. If the wife gains more than she has lost she is not entitled to be compensated.

Measured pecuniarily, the wife ordinarily has expectation of greater contribution and benefit than the husband, and there is no danger of a jury being too liberal to the defendant in determining the value

of the wife's services in a suit by a widow for the death of the husband.

As pecuniary compensation is all that is to be awarded under the death statutes, a defendant is certainly entitled to have the jury consider in mitigation of damages the value of any benefit or relief that comes to the beneficiaries by reason of the death.

(4)

That the defendant was entitled to have the jury instructed to take into consideration the probability of Mrs. Moser's marrying again.

Mrs. Moser was just 27 (Rec. p. 79). So far as we have found, this question is an open one in the Federal Courts.

In the very recent case of *Sipes v. Michigan Central*, 231 Mich. 404, 204 N. W. 84, decided in June, 1925, the Supreme Court of Michigan, however, says:

> "The widow was 21 years of age at the time of the trial, and defendant requested the court to instruct the jury to consider, in fixing the period of loss of support, the possibility of her remarriage. This was covered by the tenth request, and was not given, nor the substance thereof included in the charge. The possibility of so young a person contracting another marriage should have been permitted to temper the thought of celibacy for 39 years. Jones v. McMillan, 129 Mich. 86, 88 N. W. 206."

(5)

There being nothing to show that deceased had any qualifications that would render any advice or training by him a matter of pecuniary value, or of such character as could only be supplied by another for compensation or that any training, advice or nurture he might furnish had any pecuniary value, such elements should not have been submitted to the jury, but they should have been instructed to disregard the same.

In *Michigan Central v. Vreeland*, 227 U. S. 59, this Court says:

> "When the beneficiary is a child, for the loss of that care, counsel, training and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the services of another for compensation. * * * In such a case it has been held that the deprivation is such as to admit of definite valuation, if there be evidence of the fitness of the parent and that the child has been actually deprived of such advantages."

And in *American Railway Co. v. Didricksen*, 227 U. S. 145, 57 L. Ed. 456:

> "There was no allegation for any such loss, nor any evidence relating to the subject, or from which its pecuniary value might have been estimated. The scope of the compensation recoverable under this statute has been so fully considered in Michigan C. R. Co. v. Vreeland, decided January 20, 1913 (227 U. S. 59, ante, 417,

33 Sup. Ct. Rep. 192), that we need not say more."

In *Griffey v. Pacific Electric Company*, 209 Pacific 50, the Supreme Court of California considers at length the question of whether a father may, in an action for the death of his grown daughter, recover on account of loss of society and comfort and specially as those terms might involve the loss of advice and counsel, etc., and concludes that those elements could not be considered without proof of the daughter's special qualification to render service in that connection and its value.

And in *Sipes v. Michigan Central*, decided June 15, 1925, 204 N. W. 84, the Supreme Court of Michigan, while recognizing that the pecuniary loss of an infant might include the expense of supplying such degree of nurture and moral and physical training "as the evidence shows such parent was, by reason of ability, character and temperament, capable of giving," says:

"Mere parentage does not carry such a showing.

"Evidence relating to the nurture bestowed, and revealing the intellectual powers and moral character of the person, is available, and must be introduced to show the extent of what would have been supplied by the deceased had he lived, and, by reason of his death, need now be bought and paid for.

"To measure what has been lost, it is necessary to consider the capacity of the parent to bestow. Without such light, the jury would

have to apply their own standards, based on their individual experiences and these would, of necessity, 'be as various as their tastes, habits and opinions.' See Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 33 S. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C 176."

"And the result would therefore be reached without considering the parent at all.

"The evidence falls short on this subject and there was error in permitting the jury to assess damages for such a loss."

The evidence here clearly falls short of any showing by which the jury could measure what had been lost and any award they would make must rest solely upon mere parentage.

Proof such as was made in this case could be made in nearly any case. Nearly all men in this country of about Moser's age have been through high school and the great majority of American fathers, specially those of the middle class, are devoted to their children and like to be with them.

(6)

Defendant was entitled to have its special instructions given directing consideration in connection with the question of damages of the probable effect on deceased's earnings of a return to normal conditions after the abnormal conditions of the war; of the effect of advancing age and possible sickness, etc., and the hazardous nature of his employment, etc., and their probable effect on his earning capacity.

The undisputed testimony was in keeping with common knowledge, to-wit: that wages went to absolutely abnormal conditions during the war. There had been one decrease before Moser's death from this abnormal wage rate. That further reduction would come with the return to more normal conditions was among the probabilities and defendant was entitled to have the jury consider such probable reduction of wages as might be expected to follow.

In *Burns v. Railroad*, 68 Atl. 704, the Court condemned an instruction by the trial court because of its "disregarding the important fact that his earning powers were necessarily diminished as he advanced in years."

In *Glasgo v. Green* (Pa.), 117 Atl. 79, it is said:

> "Furthermore, earning capacity extending over a long term of years should be considered as in average rather than war times (Burns v. Pennsylvania R. R. Co., supra), and the decreasing capacity, with advancing years, should also be considered."

It is the testimony of the witness Anderson and is a matter of common knowledge that the calling of deceased, that is railroad brakeman, was extra hazardous. The very hazard of the calling is one of the elements that have made for the high rate of wages paid. It is incident to the nature of the calling and not necessarily traceable to negligence. The calling made a difference of about five years in the expectancy as figured by the Insurance Companies.

In *Jones v. Kansas City Southern*, 78 So. 568, and *Simmons v. L. R. & N. Co.*, 96 So. 12, the Supreme Court of Louisiana reduces the awards that it will allow by reason of the extra hazard of the calling.

Respectfully submitted,

ALEX. BRITTON,
J. W. TERRY,
CHAS. K. LEE.

Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

—o—

Gulf, Colorado & Santa Fe Railway Company,
Petitioner,

vs.

Mrs. Olena Moser, Administratrix, *Respondent.*

—o—

In the Matter of the Petition of Gulf, Colorado & Santa Fe Railway Company for a Writ of Certiorari to the Court of Civil Appeals of the State of Texas for the Third Supreme Judicial District.

—o—

NOTICE OF MOTION AND APPLICATION

Please take notice that on or about the 19th day of April, 1926, the Gulf, Colorado & Santa Fe Railway Company, as petitioner, will file with the Clerk of the Supreme Court of the United States, a certified copy of the transcript of record herein and requisite number of printed copies thereof, together with its petition for a writ of certiorari, a copy of which, with the brief in support thereof, is hereto attached, and petitioners will move the motion hereto annexed before the Supreme Court of the United States, at the Capitol, in the City of Washington, District of Columbia, on Monday, the 3rd day of May, 1926, at the opening of the court on that day, or as soon thereafter

counsel can be heard, and that it will then and ere move for such further relief in the premises as ay be just.

Dated at Fort Worth, Texas, April 14, 1926.

ALEX. BRITTON,
J. W. TERRY,
CHAS. K. LEE.

Attorneys for Petitioner.

A. L. CURTIS,
Attorney for Respondent,
Mrs. Olena Moser, Administratrix.

ACKNOWLEDGMENT OF SERVICE AND AGREEMENT FOR SUBMISSION

Service and receipt of copies of the foregoing notice d attached copy of motion and application for writ certiorari and brief in support thereof hereby ad- tted and accepted, this the day of April, 26; and I agree that the said motion, application d brief may be submitted on Monday, the 3rd day May, 1926, as therein provided.

Attorney for Mrs. Olena Moser, Administratrix, Respondent.

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—o—

MOTION

Now comes the Gulf, Colorado & Santa Fe Railway Company, by Alex. Britton, J. W. Terry and Chas. K. Lee, its attorneys and counsel, and moves this court upon a certified copy of the transcript of the record herein and upon the annexed petition for a writ of certiorari to be directed to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas, to bring before this Honorable Court the case of Gulf, Colorado & Santa Fe Railway Company, plaintiff in error, vs. Mrs. Olena Moser, Administratrix, defendant in error, recently decided by said Court of Civil Appeals of Texas, for such proceedings therein as this Honorable Court may deem just, and

for such other and further relief in the premises as may be just.

ALEX. BRITTON,
J. W. TERRY,
CHAS. K. LEE.

Attorneys for Petitioner.